Supreme Court, U.S.
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No. 06-99

IN THE

Supreme Court of the United States

ELIZABETH TURPIN,
Petitioner,

versus

COMMONWEALTH OF KENTUCKY,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

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PETITION FOR A WRIT OF CERTIORARI
With Appendix

J. VINCENT APRILE II
Counsel of Record
LYNCH, COX, GILMAN & MAHAN, P.S.C.
500 West Jefferson Street
Suite 2100
Louisville, Kentucky 40202
502.589.4215 (Voice)
502.589.4994 (Fax)

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Whether the courts below in denying petitioner's claims of ineffective assistance of counsel at her death penalty trial failed to use proper standards in violation of *Strickland* v. *Washington,* 466 U.S. 668 (1984), and its progeny, by, *inter alia*, accepting any reason articulated by trial counsel, without more, as reasonable "trial strategy" that immunized counsel's conduct from being ineffective assistance under the Sixth and Fourteenth Amendments?

2. Whether the failure of petitioner's counsel to conduct an adequate mitigation investigation or to present any mitigating evidence at the sentencing phase of her death penalty trial constituted ineffective assistance of counsel under the Sixth and Fourteenth Amendments, even though petitioner did not receive the death sentence, despite the jury's finding of an aggravating circumstance, but instead received Kentucky's then penultimate punishment of life imprisonment without benefit of parole eligibility for twenty-five years?

3. Whether petitioner was denied effective assistance of counsel under the Sixth and Fourteenth Amendments by the failure of her trial counsel to object to inadmissible evidence in both phases of her death penalty trial for murder?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky appears at Appendix A to the petition and is unreported. [*Turpin* v. *Commonwealth*, August 5, 2005, 2005 WL 1845870; (App., *infra*, A1-A4).] The order of the Kentucky Supreme Court denying petitioner's timely motion for discretionary review appears at Appendix B to the petition and is unreported (App., *infra*, A5).

The order of the Fayette Circuit Court denying petitioner's motion for post-conviction relief appears at Appendix C to the petition and is unpublished (App., *infra*, A6-A7).

JURISDICTION

The date on which the Court of Appeals of Kentucky decided petitioner's case was August 5, 2005. [*Elizabeth Turpin* v. *Commonwealth of Kentucky*, Kentucky Court of Appeals, No. 2003-CA-002750-MR.] A timely motion for discretionary review was denied by the Supreme Court of Kentucky on February 15, 2006. [*Turpin* v. *Commonwealth*, Kentucky Supreme Court, No. 2005-SC-699.]

On May 11, 2006 an extension of time to file the petition for writ of certiorari was granted to and including July 17, 2006 in Application No. 05A1012. It appears at Appendix D (App., *infra*, A8).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Six of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment Fourteen of the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Within the parameters of petitioner's 1986 capital murder trial and her sentence of life imprisonment without eligibility for parole for twenty-five years are two issues of importance for this Court to review. The first is the recurring problem of lower courts in administering the principles of *Strickland* v. *Washington*, 466 U.S. 668 (1984), conferring immunity for counsel's deficient performance simply because counsel articulates a reason for the conduct or inaction, without regard to the reasonableness of the decision in light of all the circumstances.

The second is the tendency of lower courts in cases where a death sentence was sought but the accused was instead sentenced to a severe term of imprisonment to decline to hold trial counsel to the professional norms of death penalty litigators and to treat claims of ineffective assistance of coun-

sel at sentencing regardless of the deficiencies in performance, as meeting prevailing professional norms simply because the jury did not return a sentence of death.

In 1986 Elizabeth Turpin, petitioner, and her co-defendant, Karen Brown, after a joint jury trial in a Kentucky state court were convicted of the capital murder of petitioner's husband, Michael Turpin. The theory of the prosecution was that Keith Bouchard, aided and assisted by Brown, stabbed and killed Turpin as part of an agreement and conspiracy with petitioner to murder petitioner's husband to receive the proceeds from his life insurance.

Before trial, the prosecution entered into a deal with Bouchard, who faced a possible death sentence, that allowed him to receive a life sentence in return for a plea of guilty to capital murder on the condition that he testify at trial against Brown and petitioner.

At trial the prosecution sought the death penalty against both Brown and petitioner.[1] Bouchard testified for the prosecution. The jury at the conclusion of the sentencing phase rejected the death penalty for both Brown and petitioner and instead recommended that both be sentenced to life imprisonment without parole eligibility for twenty-five years, then Kentucky's penultimate punishment.[2] On December 2, 1986, the judge sentenced petitioner and Brown in accordance with the jury's recommendations.

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[1] In Kentucky it is a statutory "aggravating circumstance" if "[t]he offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value, or for other profit." Kentucky Revised Statute 532.025(2)(a)(4).

[2] In Kentucky the sentence of "life without benefit of probation or parole until the defendant has served a minimum of twenty-five years of his sentence" shall not be imposed "unless at least one (1) of the statutory aggravating circumstances enumerated in subsection (2)" of Kentucky Revised Statute 532.025 is "found beyond a reasonable doubt." Kentucky Revised Statute 532.025(3).

Petitioner testified during the guilt phase of her trial and denied any part in planning or executing the murder of her husband. [TE 17, pp. 136-139; TE 18, pp. 58-59, 74-75.] Petitioner's mother and father also testified as defense witnesses in the guilt phase. During the mitigation phase with the death penalty a possible sentence, petitioner's counsel called no witnesses.

Petitioner's co-defendant, Karen Brown called three witnesses, including her sister, her former basketball coach, and a person for whom she had worked as a babysitter. All three witnesses expressed the opinion, without objection from petitioner's counsel, that Karen Brown was a follower rather than a leader. [TE 20, pp. 24, 25, 33 and 36.]

In 1986 petitioner, upon conviction of murder and the finding of at least one statutory aggravating circumstance, could have been sentenced to death, life imprisonment without parole eligibility for twenty-five years, life imprisonment with parole eligibility after eight years, or a term of imprisonment of not less than twenty years. *Morris* v. *Commonwealth*, 766 S.W.2d 58 (Ky. 1989).

After petitioner's direct appeal and unsuccessful federal habeas corpus proceedings, petitioner on September 30, 1997 filed a motion to vacate judgment and sentence pursuant to Kentucky Rule of Criminal Procedure 11.42. This motion was filed in the Fayette Circuit Court in Lexington, Kentucky where a new judge replaced petitioner's trial judge.

In the 11.42 motion, petitioner claimed that she "was denied effective representation of counsel at the trial of this action thus depriving her of a fair trial." [TR 10, 1052.] Petitioner emphasized that "[e]ffective assistance of counsel is guaranteed under the Sixth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment of the United States Constitution." [TR 10, 1052.] The motion identified numerous acts or omis-

sions of petitioner's trial counsel that constituted ineffective assistance of counsel, including trial counsel's failure "to object to inadmissible evidence which prejudiced" petitioner with some forty-five specific allegations complete with citations to the trial transcript where the failure to object occurred. [TR 10, 1054-1062.]

Petitioner in the motion also alleged as ineffective assistance of counsel that "[t]rial counsel failed to properly investigate this case by failing to interview and secure the attendance of material witnesses[,] ... especially ... in the penalty phase of this indictment which was tried as a capital case in which [petitioner's] counsel called no witnesses whatsoever even though witnesses were known and available to offer relevant mitigation testimony." [TR 10, 1053-54.]

The trial court originally denied petitioner an evidentiary hearing, but a hearing was held after the Kentucky Supreme Court on discretionary review reversed the Kentucky Court of Appeals and remanded the matter to the trial court for further consideration.

At the hearing petitioner presented evidence concerning trial counsel's failure to object to certain evidence, their failure to properly investigate mitigation and their failure to call witnesses at the penalty phase hearing. Witnesses at the postconviction hearing included David Franklin (petitioner's trial counsel), June Zehnder (petitioner's mother), Mel Zehnder Jr. (her brother), Carol Zehnder (her sister-in-law), Carol Paisley (a former employer), and Dr. Wilkerson (her former teacher and therapist). Judge Lewis Paisley testified by way of deposition taken upon written questions. [TR 11, pp. 1290-1292, 1297.] Petitioner's other trial attorney, Rick Rose, was deceased by the time of the evidentiary hearing.

The trial court in a brief order overruled petitioner's motion for post conviction relief. [TR 11, 1340-41; (App.,

infra, A6-A7).] The order noted that trial counsel Franklin "admitted that Rick Rose, who was an experienced attorney in capital cases, made many of the decisions regarding trial strategy." The trial court found that "trial counsels [sic] had discussed the issues raised in" petitioner's motions and had "articulated reasons for the strategy which they used." Although the trial court "was concerned about counsel not calling witnesses during the penalty phase of the trial, especially" petitioner, the court noted that "[c]ounsel articulated reason [sic] for that decision and stated why they relied on youth and immaturity as mitigators."[3] The trial court reaffirmed its previous ruling. [TR 11, pp. 1340-41.]

On the appeal to the Kentucky Court of Appeals from the circuit court's second overruling of petitioner's postconviction relief motion, petitioner raised the argument that "judgment against [petitioner] should be vacated because [petitioner] did not receive effective assistance of counsel at the trial level." That argument contained three separate components: (1) "[t]he trial court in its order denying [petitioner] relief failed to utilize the proper standards in assessing claims of ineffective assistance of counsel"; (2) petitioner "was denied effective assistance of counsel by the failure of counsel to object to inadmissible evidence"; and (3) "failure to properly investigate mitigation and failure to call witnesses at the penalty phase." [Brief for Appellant, *Elizabeth Turpin* v. *Commonwealth of Kentucky*, Kentucky Court of Appeals, No. 2003-CA-002750-MR.]

The Kentucky Court of Appeals rejected petitioner's argument that "the trial court 'failed to utilize the proper

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[3] In Kentucky "[t]he youth of the defendant at the time of the crime" is a statutory "mitigating circumstance." Kentucky Revised Statute 532.025(2)(b)(8).

standards in assessing claims of ineffective assistance of counsel'" (App., *infra*, A2). The appellate court also ruled that petitioner had failed to meet her burden under *Strickland* as to her claims that counsel were "ineffective for failing to object to inadmissible evidence" (App., *infra*, A3). The Court of Appeals declined to consider "each instance individually," and instead elected to "uphold [its] earlier opinion," which had been reversed by the Kentucky Supreme Court, where it had been stated that "many, if not most, would not be considered inadmissible evidence."

Finally the Court of Appeals addressed petitioner's claim of ineffective assistance of counsel during the penalty phase, "specifically ... the deficient investigation into and presentation of mitigation evidence" (App., *infra*, A4.) Here the appellate court "defer[red] to the trial court's acceptance of counsel's explanation regarding the joint decision not to present further testimony during the penalty phase." The appellate court affirmed the trial court's overruling of the post conviction motion.

In her motion for discretionary review filed in the Kentucky Supreme Court on September 2, 2005, petitioner's "questions of law involved" were the "general question" of "[w]hether [petitioner] was denied effective assistance of counsel at trial," with the included questions of: (1) "[w]hether the Court of Appeals and [t]rial [c]ourt properly utilized existing standards for determination of ineffectiveness of counsel"; and (2) "[w]hether the Court of Appeals and [t]rial [c]ourt properly evaluated counsel's decision not to present witnesses at the penalty phase." [Motion for Discretionary Review, *Turpin* v. *Commonwealth*, Kentucky Supreme Court, No. 2005-SC-699, p. 8.]

In the discretionary review motion, petitioner asserted that the "[r]easons for review of this decision include the fact that both the [t]rial [c]ourt and the Court of Appeals failed to give any meaningful evaluation to the issue of

trial counsel's failure to make proper objections to inadmissible evidentiary matters, and failed to properly evaluate counsel's investigation of mitigation evidence and counsel's failure to present any mitigation in the penalty phase of [petitioner's] trial." [Motion for Discretionary Review, p. 8.]

The Kentucky Supreme Court denied petitioner's motion for discretionary review (App., *infra*, A5).

The following is a synopsis of the procedural history of petitioner's twenty year effort to obtain relief from her conviction of murder and sentence of life imprisonment without eligibility for parole for twenty-five years.

Petitioner appealed her murder conviction to the Kentucky Supreme Court which affirmed her conviction and sentence. *Turpin* v. *Commonwealth*, 780 S.W.2d 619 (Ky. 1989). This Court denied certiorari. *Turpin* v. *Kentucky*, 494 U.S. 1058 (1990). Petitioner then sought federal habeas corpus relief in the United States District Court for the Eastern District of Kentucky. That court granted petitioner's habeas corpus petition. On appeal, the United States Court of Appeals for the Sixth Circuit in 1994 reversed the district court and denied petitioner habeas relief. *Turpin* v. *Kassulke*, 26 F.3d 1392 (6th Cir. 1994). Certiorari was denied. *Turpin* v. *Kassulke*, 513 U.S. 1118 (1995).

On September 30, 1997, petitioner filed in the Fayette Circuit Court, pursuant to Kentucky Rule of Criminal Procedure 11.42, a motion to vacate the judgment and sentence. [TR 10, pp. 1051-1121.]. On January 8, 1999 the trial court judge, who had not presided over petitioner's trial, denied petitioner's motion without granting an evidentiary hearing. [TR 11, pp. 1213-1217; (App., *infra*, A9-A13).] Petitioner appealed this ruling to the Kentucky Court of Appeals, which affirmed the trial court on May 19, 2000 (App., *infra*, A14-A20). *Elizabeth Turpin* v. *Commonwealth*

of Kentucky, Court of Appeals of Kentucky, No. 1999-CA-000117-MR (May 19, 2000). The Kentucky Supreme Court granted petitioner's motion for discretionary review, reversed the decision of the Court of Appeals and remanded the matter back to the trial court for further consideration (App., *infra*, A21). *Elizabeth Turpin* v. *Commonwealth of Kentucky*, Supreme Court of Kentucky, No. 2000-SC-0491-D (February 13, 2002).

An evidentiary hearing was held in the Fayette Circuit Court on January 22 and 23, 2003. The trial court on November 26, 2003 entered an order overruling petitioner's motion to vacate the judgment and sentence (App., *infra*, A6-A7). Petitioner appealed to the Kentucky Court of Appeals, which affirmed the trial court's ruling (App., *infra*, A1-A4). *Elizabeth Turpin* v. *Commonwealth of Kentucky*, Kentucky Court of Appeals, No. 2003-CA-002750-MR, (August 5, 2005). Petitioner's motion for discretionary review was denied by the Kentucky Supreme Court on February 15, 2006 (App., *infra*, A5). *Turpin* v. *Commonwealth*, Kentucky Supreme Court, No. 2005-SC-699 (February 15, 2006).

Twenty years after her conviction for murder petitioner seeks to have this Court grant her petition for certiorari and examine the plight of those criminal defendants who seek redress from the ineffective assistance of their trial counsel in the context of trials where the death penalty was sought but rejected by the sentencer.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With This Court's Opinion in *Strickland* v. *Washington*, 466 U.S. 668 (1984), And Its Progeny

Following the evidentiary hearing, the trial court judge disposed of all of petitioner's ineffective assistance of counsel claims in a single paragraph explanation. [TR 11, 1340-41; (App., *infra*, A6-A7).] The trial court found in its

November 26, 2003 order "that trial counsels [sic] had discussed the issues raised in [petitioner's] motions and *articulated reasons for the strategy which they used.*" The trial court's language indicates that *any reason* articulated by defense counsel to explain counsel's action or omission will make counsel's performance reasonable under prevailing professional norms. However, the federal constitutional touchstone is whether the strategy pursued was based on both a reasonable investigation and whether the decisions made were reasonable in the context of the investigation and other factors known to counsel, including plausible options.

After expressing its "concern[] about [petitioner's] counsel not calling witnesses during the penalty phase of the trial, especially the [petitioner], Ms. Turpin," the trial court again found that trial defense "counsel articulated *reason* [sic] for that decision and stated why they relied on youth and immaturity as mitigators" (App., *infra*, A6). The wording of the order strongly suggests that counsel's reasons once stated on the record, regardless of their reasonableness, immunize defense counsel from a finding of ineffective assistance of counsel. This approach is in direct conflict with this Court's analysis of strategic decision-making by defense counsel.

In its previous order that overruled petitioner's motion for postconviction relief, the same circuit court judge had addressed petitioner's allegation that "trial counsel was ineffective by failing to interview and secure the attendance of material witnesses, especially in the penalty phase when [petitioner] did not call any witnesses." [TR 11, pp. 1213-1217; (App., *infra*, A9-A13).] In rejecting this claim, the circuit court reasoned that "[t]his may have been trial strategy and it may have been effective since [petitioner] did not receive the death penalty which the Commonwealth sought" (App., *infra*, A10). Even without having heard any

testimony from petitioner's trial attorneys, the trial judge added, "If it was trial strategy it would not lead to ineffectiveness." The language used strongly indicates that once the shibboleth of "trial strategy" is mentioned by trial counsel, the court is not free to evaluate the reasonableness, under the circumstances, of counsel's performance.

As this Court has explained, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 481 (2000). "'[T]he mere incantation of "strategy" does not insulate attorney behavior from review.'" *Fisher* v. *Gibson*, 282 F.3d 1283, 1296 (10th Cir. 2002), quoting *Brecheen* v. *Reynolds*, 41 F.3d 1343, 1369 (10th Cir.1994) (internal quotation omitted).

Addressing petitioner's argument that the trial court had "failed to utilize the proper standards in assessing claims of ineffective assistance of counsel," the Kentucky Court of Appeals (App., *infra*, A2) noted that petitioner had "allude[d] to the trial court's and [the Court of Appeals'] earlier reliance on the now overturned criterion enunciated in *Robbins* v. *Commonwealth*, 719 S.W.2d 742 (Ky.App. 1986), overruled by *Norton" v. Commonwealth*, 63 S.W.3d 175 (Ky. 2002). The Court of Appeals concluded that "there is nothing in the post-evidentiary hearing ruling to indicate that *Robbins* was instrumental in the trial court's decision to deny once again [petitioner's] relief," holding that this "argument must fail."

However, in *Robbins*, *supra* at 743, the Court of Appeals of Kentucky appeared to distort this Court's teachings in *Strickland* v. *Washington*, 466 U.S. 668 (1984), by saying "[t]he record indicates that counsel chose not to put on evidence for strategic reasons, which will not be second-guessed here." Although "second-guessing" is defined as criticizing a decision after its outcome is known, that is exactly what the *Strickland* decision requires a court to do

when presented with an ineffective assistance of counsel claim. The American Heritage Dictionary of the English Language, Fourth Edition (2000). Criticism is judgmental analysis or evaluation.

"[E]ven where an attorney pursued a particular course of action for strategic reasons, courts still consider whether that course of action was objectively reasonable, notwithstanding *Strickland*'s strong presumption in favor of upholding strategic decisions." *Bullock* v. *Carver*, 297 F.3d 1036, 1048 (10th Cir. 2002). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland* at 690. By definition this type of post-mortem evaluation will always be undertaken with full knowledge of the outcome of the trial and sentencing. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland* at 689.

The methodology required by this Court's *Strickland* decision and its progeny cannot be reduced to an automatic judicial acceptance of *any articulated reason* for the challenged conduct provided by the trial attorney. In *Norton*, *supra*, at 177, the Kentucky Supreme Court was "compelled to overrule *Robbins* to the extent that it conflicts with *Strickland*, albeit inadvertently." This would appear to include all apparent conflicts with *Strickland*.

Contrary to the Court of Appeals' resolution of petitioner's "proper standards" argument, the misanalysis of the now overruled *Robbins* opinion appears to have resurfaced in the trial court's order following the post-conviction evidentiary hearing.

Before strategic or tactical decisions attain the unassailable status, certain facts must be established. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland* at 690-691. The conduct or inaction in question must "reflect reasonable professional judgment." *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003).

Of course, counsel's articulated reason in and of itself does not automatically become trial strategy. Even when a court concludes that counsel's conduct was trial strategy, the court "cannot stop there, for [the court] must also assess if this strategy itself was constitutionally deficient." *Washington* v. *Hofbauer*, 228 F.3d 689, 703-704 (6th Cir. 2000). "[E]ven deliberate trial tactics may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance." *Martin* v. *Rose*, 744 F.2d 1245, 1249 (6th Cir.1984) (internal quotations and citation omitted). The term "strategy" is not a blanket justification for conduct which otherwise constitutes ineffective assistance of counsel.

Review of the trial court's brief order denying post-conviction relief reveals that the court evaluated only the "performance component" of the *Strickland* test and did not make any assessment of the "prejudice component" (App., *infra*, A6-A7). This is a perfectly acceptable approach. "[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland* at 697. However, as a result of this approach, the trial court never ruled on the prejudice component. Thus, the trial court's use of improper constitutional

standards to evaluate the performance component is fatal to the trial court's holding that petitioner was not denied effective assistance and that ruling cannot be resurrected on the basis of whether the prejudice component was met by petitioner.

Analysis of but one of the instances of ineffective assistance of counsel identified by petitioner in the litigation below reveals how the trial court accepted any articulated reason as a basis for concluding the conduct or omission was the result of reasonable professional judgment.

Petitioner did testify at the guilt-innocence phase of her trial and denied any part in planning the murder of her husband, Michael Turpin. Petitioner's mother and father also testified on her behalf at the guilt phase of the trial. After conviction, during the mitigation phase of the trial, petitioner's defense counsel called no witnesses.

Karen Brown, petitioner's co-defendant, called three mitigation witnesses – her sister, her former basketball coach, and a person for whom she had worked as a babysitter. All three of those witnesses expressed the opinion, without objection, that Karen Brown was a follower not a leader.

When asked at the evidentiary hearing about the issue of who was the leader, petitioner or her co-defendant, Karen Brown, petitioner's trial counsel, Franklin, explained that he thought this was irrelevant because the theory of petitioner's defense was she was not involved in her husband's murder at all. [Hearing Tape: 1-22-03; 10:24:26.] However, once the jury had convicted petitioner of murder, it was undoubtedly clear that the jury had rejected the defense that she was not involved in her husband's murder. At the sentencing hearing the jury had to have reasons why the two most severe punishments, death and life without eligibility for parole for twenty-five years, should not be imposed on petitioner.

"[I]n a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed." *Florida* v. *Nixon*, 543 U.S. 175, 192 (2004). "[T]he gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus." *Id.* at 190-191.

Trial counsel's dismissal of mitigating evidence portraying petitioner generally as a follower because it would be inconsistent with the guilt phase defense theory that petitioner was not involved in the murder was not reasonable. Trial counsel's "reason" ignores the context provided by the jury's verdict of guilty and the co-defendant's efforts to portray herself as the follower and petitioner as the leader. Certainly the presentation of evidence demonstrating petitioner's "follower" attributes would not even have to be presented as an admission that petitioner participated in the murder as a follower, but only as a rebuttal of this mischaracterization of her.

Petitioner's defense counsel were aware from the beginning of their involvement in petitioner's case that petitioner and Karen Brown would undoubtedly be tried together at a joint trial. Defense counsel knew that if both petitioner and Karen Brown were found guilty of the murder, the jury in determining an appropriate sentence for each would have to assess individual culpability. Yet trial counsel apparently did not prepare for this obvious and likely possibility.

Additionally, trial counsel stated at the evidentiary hearing that he was not surprised by the jury's guilty verdict, figuring that it was more likely than not that petitioner would be found guilty. [Hearing Tape: 1-22-03;10:35:06.] Despite that belief, trial counsel considered mitigating evidence on the issue of petitioner's status as a follower "irrelevant."

If, however, the trial court, employing an incorrect federal constitutional standard, has automatically deemed any reason or strategy articulated by trial counsel as reasonable under prevailing professional norms, without conducting the proper evaluation, there is not even a judicial finding of fact to be reviewed.

On the issue of "the deficient investigation into and presentation of mitigation evidence," the Kentucky Court of Appeals did nothing to cure the trial court's use of improper standards, but instead "defer[ed] to the trial court's acceptance of counsel's explanation regarding the joint decision [of both trial counsel] not to present further testimony during the penalty phase" (App., *infra*, A4). Thus, the appellate court endorsed the trial court's automatic acceptance as reasonable of the "reasons" given by trial counsel for presenting no testimony at the mitigation phase of the trial without conducting the requisite *Strickland* judicial inquiry on the performance component of the ineffectiveness claim.

Whether assessed by the language of both the trial court's order and the opinion of the Court of Appeals or by the evidence presented at the evidentiary hearing, it is clear that the trial court worked on the premise that any reason articulated by trial counsel made counsel's decisions "strategy," which could not be ineffective assistance of counsel, no matter how unreasonable under the circumstances. This position, specifically endorsed by the appellate court, constituted a failure to utilize the proper standards in assessing petitioner's claims of ineffective assistance of counsel and denying her relief.

II. The Decision Below Involves A Constitutional Question of Importance in the Administration of Criminal Justice

Petitioner was tried for murder and the prosecution was seeking the death penalty. The jury convicted her and

her female co-defendant of murder. At the sentencing phase of her bifurcated trial, the jury, upon a finding of one statutory aggravating circumstance, could have sentenced her to death. Instead, although finding the requisite statutory aggravating factor for imposing a death sentence, the jury recommended that both defendants be sentenced to life imprisonment without parole eligibility for twenty-five years.

It is in this context that petitioner's two trial lawyers put on no witnesses in the sentencing phase, despite presenting as the guilt phase theory of the defense that petitioner was not involved in the murder of her husband, which was physically perpetrated by her co-defendant, Brown, and the prosecution's key witness, Keith Bouchard.

Petitioner's trial lawyers were required in preparing for trial and trying her case, including the sentencing phase, to meet the professional norms of death penalty litigators at the time of her trial. Nevertheless, the Kentucky courts have treated petitioner's ineffective assistance of counsel claim as if her counsel's performance, including calling no witnesses at the sentencing hearing, has met applicable prevailing professional norms simply because the jury did not return a death sentence.

Indeed, the trial court in its initial order overruling petitioner's postconviction relief motion opined that trial counsel's failure "to interview and secure the attendance of material witnesses, especially in the penalty phase when [the defense] did not call any witnesses, ... may have been trial strategy and it may have been effective since [petitioner] did not receive the death penalty which the Commonwealth sought." [TR 11, pp. 1213-1217; (App., *infra*, A10).] That observation was made by the trial court without the benefit of an evidentiary hearing and the testimony of petitioner's trial lawyers.

Criminal defendants who are tried by prosecutors seeking the death penalty but receive their jurisdiction's penultimate punishment, such as life imprisonment without parole or life imprisonment without eligibility for parole for twenty-five years, are often treated as if they are less deserving of the requisite judicial scrutiny of their counsel's performance simply because, despite the deficiencies of their counsel, these defendants did not receive a death sentence. Such an approach, whether intentional or unintentional, erodes the Sixth Amendment's guarantee of effective assistance of counsel.

Petitioner's case presents this important constitutional question of importance in the administration of criminal justice, albeit implied more than directly expressed. The trial court found in its November 26, 2003 order "that trial counsels [sic] had discussed the issues raised in [petitioner's] motions and *articulated reasons for the strategy which they used*" (App., *infra*, A6; emphasis added). Although expressing "concern[] about [petitioner's] counsel not calling witnesses during the penalty phase of the trial, especially the [petitioner], Ms. Turpin," the trial court again found that trial "counsel articulated *reason* [sic] for that decision and stated why they relied on youth and immaturity as mitigators" (App., *infra*, A6; emphasis added).

On appeal the Kentucky Court of Appeals "defer[red] to the trial court's acceptance of counsel's explanation regarding the joint decision not to present further testimony during the penalty phase" (App., *infra*, A4).

A review of the testimony given at the evidentiary hearing by trial counsel and other witnesses reveals that the courts in resolving this claim failed to scrutinize the conduct of trial counsel and his articulated reasons for his failure to act.

Petitioner's trial counsel, Franklin, was questioned extensively concerning the decision not to call mitigation wit-

nesses at the postconviction hearing. He initially explained that the decision not to call mitigation witnesses was a joint decision, meaning it was made by both Franklin and his co-counsel, Rose. [Hearing Tape: 1-22-03; 10:10:42.] Franklin attempted to justify the decision by stating that there was not "a whole lot you can do" if the client who had entered a not guilty plea would not recant his denial. [Hearing Tape: 1-22-03; 10:10:56.] Franklin added that there were no witnesses other than petitioner who were prepared to testify for mitigation and that no one in Virginia was willing to come to testify. However, Franklin recalled that he had talked to no one in Virginia and had not been given names by the defendant to talk to concerning possible mitigation. [Hearing Tape: 1-22-03; 10:11:45.] Franklin testified that he believed that most people acquainted with petitioner would not be the type of witness that they would have wanted to call. [Hearing Tape: 1-22-03; 10:13:55.] Trial counsel said he was aware of petitioner's employment with Judge and Carol Paisley. In fact, he claimed that he had spoken with both Judge Paisley and Carol Paisley, discussing their acquaintance with petitioner. However, he was unsure if he ever discussed with them the possibility of being witnesses. [Hearing Tape: 1-22-03; 10:14:24.]

Counsel could not remember if he was aware of petitioner being in counseling in Virginia between the time she left the University of Kentucky and the time she returned to Lexington to marry Michael Turpin, which would have been the summer before his death. Franklin claimed that Dr. Wilkerson's name sounded vaguely familiar, but could not remember talking with her. [Hearing Tape: 1-22-03; 10:21:09.] When asked what kind of evidence he was seeking to present in the penalty phase, trial counsel lamented that all he could remember was that Rose did the closing focusing on youth and immaturity. Counsel was sure he had talked to possible witnesses, but could not

remember if he did and did not know what Rose, his co-counsel, did in this area. [Hearing Tape: 1-22-03; 10:22:26.]

Franklin was not surprised by the guilty verdict returned by the jury, figuring it was more likely than not that petitioner would be found guilty. [Hearing Tape: 1-22-03; 10:35:06.] Franklin did not remember when the decision was made not to call witnesses in the penalty phase, but he believed that decision was left up to Rose. Franklin presumed the final decision was made at the time of the verdict. However, Franklin could not remember whom they would have called at the mitigation phase had this decision not been made. [Hearing Tape: 1-22-03; 10:35:47-10:36:09.]

Counsel asserted that he met with petitioner's parents, her brother, and sister-in-law. He later stated that he may have met with another brother of petitioner. [Hearing Tape: 1-22-03; 11:25:58 and 13:09:49.] Petitioner, however, had only one brother. Franklin said that he presumed if Rose and he had any good witnesses or witnesses who would have been helpful that they would have called those witnesses. [Hearing Tape: 1-22-03; 11:28:26-11:29:43.] Franklin did not recall specific people with whom he spoke, but assumed that he or Rose would have talked to witnesses if counsel were provided names. Franklin also could not remember if names were provided, but thought that the family had provided names. Franklin was sure that he or Rose would have talked to the people on the list provided by the family. [Hearing Tape: 1-22-03; 11:28:26; 11:29:43; 13:09:49 and 13:11:04.]

As stated previously, the co-defendant, Karen Brown, did call witnesses in mitigation to testify that she was more of a follower than a leader. Also, at least one witness at the guilt/innocence phase testified as to Karen being a follower. When asked specifically about the issue of who was the leader – petitioner or Brown, Franklin responded

that he thought that this was irrelevant because the defense theory was that petitioner was not involved at all. [Hearing Tape: 1-22-03; 10:24:26.] When asked if he believed that there was a need to do something to counteract Brown's witnesses, Franklin answered that he felt no need to counteract something that the client said never happened. [Hearing Tape: 1-22-03; 10:26:42.] However, at the time of the mitigation hearing, the jury had already convicted petitioner, rejecting the defense guilt phase theory that petitioner was not involved. Counsel's failure to attempt to counter this evidence with defense evidence could not be reasonable as petitioner's guilt had already been established by the jury, despite her denial of involvement in the guilt phase.

June Zehnder, petitioner's mother, testified at the postconviction hearing that she believed that she gave a list of possible witnesses to David Franklin, including certain named individuals from Virginia. [Hearing Tape: 1-22-03; 12:51:09.] Mrs. Zehnder explained that she had met with the defense attorneys and that she was told that the witnesses would be called. Then Ms. Zehnder was told that the attorneys did not think witnesses were necessary. [Hearing Tape: 1-22-03; 13:52:53.]

Mel Zehnder, Jr., petitioner's brother, testified that he had contact with petitioner as they were growing up, despite a six year age difference. He had seen petitioner approximately five to six times after she went to the University of Kentucky and about four times after she was married. [Hearing Tape: 1-22-03; 13:54:40-13:55:52.] Mel described petitioner as a follower around her friends, one who could be convinced by her friends to do things that she would not otherwise do. [Hearing Tape: 1-22-03; 13:56:42.] Mel stated he never met with petitioner's attorneys, but did briefly meet with Franklin during the trial. [Hearing Tape: 1-22-03; 13:49:30.] Mel also said that he visited Eliza-

beth in jail prior to the trial, noting she was nervous and would break into tears. [Trial Tape: 1-22-03; 13:58:42.]

Carol Zehnder, Mel's wife and petitioner's sister-in-law, testified that she did not talk to petitioner's attorneys, but did see petitioner in jail before the trial. Carol saw no indication that petitioner was not taking the case seriously. [Hearing Tape: 1-22-03; 14:09:03.]

The testimony of these two persons would have been important for trial not only as to their background knowledge of petitioner, especially in the case of her brother, but also because of their observations of petitioner prior to trial. Their testimony in that regard could have counteracted the trial testimony of Doug Elliott, who said that Brown had told him during the trial itself that petitioner was not taking the trial seriously and that people could say that she was dancing on tables at the detention center. [TE 14, p. 95.] Doug Elliot's testimony had come into evidence without objection.

Carol Paisley testified that petitioner kept her children in 1985 from approximately August through November. [Hearing Tape: 1-22-03; 9:25:06-9:25:49.] Ms. Paisley testified that petitioner left of her own choosing for a better paying job and had been the best babysitter that Paisley had employed. Petitioner watched the children all day, while Ms. Paisley and her husband were at work. Petitioner's job with the Paisley's was considered a full-time position. [Hearing Tape: 1-22-03; 9:20:19.] Ms. Paisley stated that after petitioner was arrested David Franklin did call her and asked her if she would testify. Ms. Paisley replied to Franklin that she would. [Hearing Tape: 1-23-03; 9:20:06.] However, Ms. Paisley did not testify at the trial.

Ms. Paisley's then husband, Judge Lewis Paisley, testified at the hearing by way of deposition by written questions. Judge Paisley explained that petitioner was a summer babysitter for his children and supervised them, saw to

their noon meal, and transported them to activities during weekdays. Judge Paisley testified that petitioner was a good babysitter and the he had no problems with her. Judge Paisley described petitioner as being reliable, punctual and seemed to relate well to children. Judge Paisley added that he never saw signs of drug use, alcohol abuse or other illegal behavior on the part of petitioner. Judge Paisley could not recall if he was contacted by petitioner's attorneys. [TR 11, pp. 1290-1292.] The testimony of the Paisley's would have been extremely important in the mitigation phase. Both witnesses put petitioner in a positive light and related positive traits about her. The opportunity to call two witnesses who could testify that they had trusted petitioner with their children and that petitioner did a wonderful job with their children should not have been passed upon by counsel.

The most important witness called at the postconviction hearing, with the exception of Franklin, was Dr. Jacqueline Wilkerson. She was a former teacher of petitioner and also involved with petitioner in counseling. This counseling occurred after petitioner had dropped out of the University of Kentucky and before she moved back to Lexington to marry Michael Turpin. Dr. Wilkerson explained that when she taught petitioner in high school, petitioner was a very good student. However, when Dr. Wilkerson saw petitioner approximately two to three years later, petitioner was a completely different persona, having experienced severe emotional problems. [Hearing Tape: 1-23-03; 9:34:09-9:35:20.]

The problems experienced by petitioner, according to Dr. Wilkerson, included a major depressive disorder, feelings that she did not fit in, emotional deterioration, identity confusion including loss of direction, and low self esteem. [Hearing Tape: 1-23-03; 9:34:45.] Dr. Wilkerson described petitioner at this time as not being sure of her-

self or where she was going in life. Furthermore, petitioner seemed very quiet, reserved, and repressed according to Dr. Wilkerson. When asked if petitioner demonstrated the characteristics of a leader when in therapy, Dr. Wilkerson explained that she did not. Instead, petitioner seemed very quiet and depressed, as she had gone from a loving nurturing family to college, where she felt lost and all alone and was still looking to fit in. [Hearing Tape: 1-23-03; 9:37:20-9:39:30.]

The testimony of Dr. Wilkerson would have been extremely helpful to petitioner at trial. This testimony would have contrasted with the picture presented by the Commonwealth that petitioner was the leader who manipulated her two co-indictees. This testimony would have allowed the jury to see the emotional makeup of this young woman shortly before she married Michael Turpin. These emotional problems were relevant in mitigation and should have been introduced. As it was, the jury was left with no positive testimony for petitioner and very little understanding of her background.

Had the jury heard mitigation evidence from the Paisleys and Dr. Wilkerson there is a very high likelihood that the jury would not have given petitioner the same sentence that was given to co-defendant Brown who actually participated in the physical act of murdering Michael Turpin.

The jury in petitioner's case without benefit of any mitigation evidence offered on her behalf, after finding the prerequisite aggravating factor, rejected the death penalty and instead recommended the imposition of the then penultimate punishment in Kentucky – life without eligibility for parole for twenty-five years. In that context, the presentation of some mitigation evidence on petitioner's behalf calculated to counter the adverse evidence against her introduced by both the prosecution and her co-defen-

dant, Karen Brown, might well have changed the jury's opinion of petitioner's culpability for punishment purposes.

Trial counsel's decisions as to the scope of the mitigation investigation and the use of that evidence at the sentencing phase are to be evaluated in the context of a death penalty sentencing phase, even though the jury recommended and the judge imposed the penultimate punishment. "Counsel's strategy choice" must be "within the range of professionally reasonable judgments." *Strickland v. Washington*, 466 U. S.668, 699 (1984).

There is a striking difference between the no-witness mitigation defense presented by trial counsel and the witnesses who testified in mitigation at the evidentiary hearing. The evidence produced at the hearing had the potential to persuade the jury to give petitioner a sentence of less than life imprisonment without eligibility for parole for twenty-five years, particularly since the jury, when provided with no mitigation witnesses, had declined to recommend a death sentence. "This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on [life without eligibility for parole for twenty-five years], that is not the test." *Rompilla* v. *Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2469 (2005). "It goes without saying that the undiscovered 'mitigating evidence, taken as a whole,' '"might well have influenced the jury's appraisal"' of [petitioner's] culpability,'" *Wiggins* [*v. Smith*], 539 U. S. [510], at 538 (quoting *Williams* v. *Taylor*, 529 U. S. [362], at 398 [2000]), and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing, *Strickland* [*v. Washington*], 466 U. S. [668 (1984)], at 694." *Rompilla* v. *Beard*, 125 S.Ct. at 2469.

Petitioner maintains that counsel rendered ineffective assistance of counsel at the penalty phase by not discovering and/or not presenting this evidence. Either the investigation was unreasonable or counsel's decision not to use the evidence, if known, was unreasonable.

Nevertheless, in the context of a defendant who through no apparent action of trial counsel was spared a death sentence, the Kentucky courts have elected to pronounce as "reasonable" the decision of petitioner's two trial counsel to conduct a deficient mitigation investigation and to call no witnesses in mitigation, despite the efforts of both the prosecution and the co-defendant to brand petitioner as the instigator and leader of the conspiracy that resulted in the murder of petitioner's husband, and thus in the jury's eyes the most culpable of the three perpetrators.

Those who were not sentenced to death by their juries have not automatically received effective assistance of counsel where upon review the deficiencies in the mitigation investigation and presentation of mitigation evidence are apparent and unreasonable. A punishment of life imprisonment without parole eligibility for twenty-five years is a much more severe sentence than a term of years or a life sentence with parole eligibility in eight years, even though it is not a death sentence. 501 Kentucky Administrative Regulations 1:030 § 3(a), Determining Parole Eligibility. This Court has recognized this principle in a similar context. "[I]f an increased prison term did flow from an error [a defendant] has established *Strickland* prejudice." *Glover* v. *United States*, 531 U.S. 198, 200 (2001).

Despite the jury's recommendation that death was not an appropriate sentence for her crime, petitioner was nevertheless still entitled to effective assistance of counsel who had conducted the appropriate mitigation investigation and who would call the mitigation witnesses in an effort not only to ensure that the jury did not recommend death but

to persuade the jury to return the least severe punishment for her crime. Petitioner did not receive the requisite effective assistance of counsel at sentencing and is not to be deprived of relief because the jury, without assistance from her trial counsel, did not recommend a sentence of death.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

J. VINCENT APRILE II
Attorney At Law
LYNCH, COX, GILMAN & MAHAN, P.S.C.
500 West Jefferson Street
Suite 2100
Louisville, Kentucky 40202

502.589.4215 (Voice)
502.589.4994 (Fax)

Counsel For Petitioner
Elizabeth Turpin

APPENDIX

RENDERED: AUGUST 5, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2003-CA-002750-MR

ELIZABETH TURPIN - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 86-CR-00172

OPINION—AFFIRMING

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

DYCHE, JUDGE: On February 3, 1986, Michael Turpin was stabbed to death by Keith Bouchard with the aid of Karen Brown. Michael's body was dumped into a pond on Lakeside Golf Course in Lexington, Kentucky. Indictments were returned versus Bouchard, Brown, and Elizabeth Turpin, Michael's widow and the beneficiary of his $50,000 life insurance policy. The death penalty was sought against all three. Bouchard entered a guilty plea and agreed to testify against Brown and Turpin, who were tried together. Each of the women was found guilty of murder and received a sentence of life without the possibility of parole for twenty-five years.

Turpin's conviction was affirmed by the Kentucky Supreme Court on November 30, 1989. *See Turpin* v. *Commonwealth*, 780 S.W.2d 619 (Ky. 1989). She unsuccessfully sought habeas corpus relief in the federal court system.

See Turpin v. *Kassulke*, 26 F.3d 1392 (6th Cir. 1994). Turpin filed her motion pursuant to RCr 11.42 on September 30, 1997. In 2002 this Court affirmed the Fayette Circuit Court's denial of relief, but the Kentucky Supreme Court subsequently reversed and remanded to the trial court for an evidentiary hearing pursuant to the standards enunciated in *Fraser* v. *Commonwealth*, 59 S.W.3d 448 (Ky. 2001), and *Norton* v. *Commonwealth*, 63 S.W.3d 175 (Ky. 2002). The Fayette Circuit Court held the evidentiary hearing on January 22 and 23, 2003.[1] Turpin was again denied relief[2] on November 26, 2003, and she appeals. We affirm.

Turpin first argues that the trial court "failed to utilize the proper standards in assessing claims of ineffective assistance of counsel." In presenting this argument, Turpin alludes to the trial court's and this Court's earlier reliance on the now overturned criterion enunciated in *Robbins* v. *Commonwealth*, 719 S.W.2d 742 (Ky. App. 1986), *overruled* by *Norton, supra*. *Robbins* had held the RCr 11.42 movant to the higher standard of proving that, but for counsel's deficiencies, the evidence would have compelled an acquittal. However, when the Supreme Court remanded this matter for an evidentiary hearing pursuant to *Fraser* and *Norton*, the trial court was put on notice to avoid the *Robbins* standard. And there is nothing in the post-evidentiary hearing ruling to indicate that *Robbins* was instrumental in the trial court's decision to deny once again Turpin's requested relief. Turpin's first argument must fail.

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[1] By the time the hearing was held, more than seventeen years had elapsed since the murder of Michael Turpin. One of Turpin's trial attorneys was deceased, and other witnesses at the hearing acknowledged imperfect memory.

[2] We note that co-defendant Brown was granted post-conviction relief by the Fayette circuit court on November 25, 2003. The commonwealth has appealed, and Brown has cross-appealed, from that order in case Numbers 2003-CA-2624 and 2003-CA-2714, respectively. Those appeals are being considered by a separate panel of this court.

Turpin next claims that counsel was ineffective for failing to object to inadmissible evidence. In this vein, Turpin refers to unchallenged witness testimony that she was, among other things, cold and calculating, more inconvenienced than concerned, a leader rather than a follower, and (by her ex-mother-in-law) that she had killed Michael Turpin; appellant continues that other inadmissible evidence included testimony that she used drugs, engaged in extra-marital sex, and would have performed a coat hanger abortion had she become pregnant by her husband. Without considering each instance individually, we uphold our earlier opinion wherein we stated that "many, if not most, would not be considered inadmissible evidence."

Furthermore, Turpin could or should have brought the majority of these issues to the attention of our Supreme Court on direct appeal. *Bronston* v. *Commonwealth*, 481 S.W.2d 666 (Ky. 1972).

Even were we to consider these allegations as actual errors by trial counsel, we are nonetheless obligated to determine whether they affected the outcome of the proceedings. *Strickland* v. *Washington*, 466 U.S. 668 (1984); *accord Gall* v. *Commonwealth*, 702 S.W.2d 37 (Ky. 1985). *See also Hodge* v. *Commonwealth*, 116 S.W.3d 463, 470 (Ky. 2003); *and Norton, supra*. Turpin's defense was one of complete denial of involvement in the scheme to murder her husband, with the focus on the lack of physical evidence tying her to the case. She fails to convince us of the reasonable probability that the absence of these alleged errors would have resulted in her acquittal or conviction of a lesser included charge. Trial counsel credibly claimed at the evidentiary hearing that the lack of objections were the result of either strategic decisions on the part of the defense team or singly of his late associate during the trial. His further explanation about the decision not to join codefendant Brown's request for an admonition regarding pretrial custody was satisfactory as well. Turpin fails to meet her burden under *Strickland* and its progeny.

We are lastly asked to consider Turpin's dissatisfaction with her representation during the penalty phase. She specifically criticizes the deficient investigation into and presentation of mitigation evidence. Again, we defer to the trial court's acceptance of counsel's explanation regarding the joint decision not to present further testimony during the penalty phase.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:
Franklin P. Jewell
Louisville, Kentucky

BRIEF FOR APPELLEE:
Gregory D. Stumbo
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky

SUPREME COURT OF KENTUCKY

2005-SC-0699-D

(2003-CA-2750)

ELIZABETH TURPIN - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

FAYETTE CIRCUIT COURT
NO. 1986-CR-0172

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED February 15, 2006.

/s/ [illegible]
Chief Justice

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
SECOND DIVISION
NO. 86-CR-172

COMMONWEALTH OF KENTUCKY - - *Plaintiff*

v.

ELIZABETH TURPIN - - - - - - *Defendant*

ORDER—Entered November 26, 2003

Movant, Elizabeth Turpin, by counsel, filed a motion to vacate her judgment and sentence pursuant to RCr 11.42. The Court denied the motion without a hearing. The Court's Order denying the motion was reversed by the Supreme Court and the case was rescinded for a hearing on the motion.

The Court has considered all of the pleadings filed concerning this motion and the evidence brought out in the hearing along with the written deposition which was filed in the case.

Several witnesses were called at the hearing. The key witness was David Franklin, one of Movant's trial counsels, Movant's other trial counsel, Rick Rose is deceased. Mr. Franklin admitted that Rick Rose, who was an experienced attorney in capital cases, made many of the decisions regarding trial strategy. The Court finds that trial counsels had discussed the issues raised in Movant's motions and articulated reasons for the strategy which they used. The Court was concerned about counsel not calling witnesses during the penalty phase of the trial, especially the Movant, Ms. Turpin. Counsel articulated reason for that decision and stated why they relied on youth and immaturity as mitigators.

The Court having considered the evidence presented and the post hearing memoranda, reaffirms it's previous

ruling and OVERRULES the motion to vacate the judgment and sentence pursuant to RCr 11.42.

This 25th day of November, 2003.

/s/ Gary D. Payne
JUDGE GARY D. PAYNE

ATTESTED COPIES TO:

Hon. Franklin Jewell
Hon. Dan Laren

this 26th day of November, 2003.

WILMA F. LYNCH, C.F.C.C.

BY: /s/ LBlack, D.C.

[LETTERHEAD OF SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001]

William K. Suter
Clerk of the Court
(202) 479-3011

May 11, 2006

Mr. J. Vincent Aprile, II
Lynch, Cox, Gilman & Mahan, P.S.C
500 West Jefferson Street, Suite 2100
Louisville, KY 40202-2812

Re: Elizabeth Turpin
v. Kentucky
Application No. 05A1012

Dear Mr. Aprile:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on May 11, 2006 extended the time to and including July 17, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
by /s/ [illegible]
Heather Trant
Case Analyst

FAYETTE CIRCUIT COURT

CRIMINAL BRANCH

SECOND DIVISION

NO. 86-CR-00172

COMMONWEALTH OF KENTUCKY - *Plaintiff/Respondent*

v.

ELIZABETH TURPIN - - - - *Defendant/Movant*

ORDER—Entered January 8, 1999

Movant, Elizabeth Turpin, now known as Elizabeth Zehnder, by counsel, moves the Court pursuant to RCr 11.42, to enter an order vacating or otherwise setting aside the judgment in this case. This action was originally tried in the Third Division of the Fayette Circuit Court, but was randomly transferred to this division due to a conflict with the judge presently sitting in the Third Division.

Movant was convicted of Murder and sentenced to life imprisonment without parole for twenty-five years by judgment of the Fayette Circuit Court on December 2, 1986. This Motion to Vacate the Judgment and Sentence was filed on September 30, 1997. The Commonwealth filed a Response and each party has filed Replies. The Court set this matter for a hearing on January 14, 1999, and stated that after reviewing the filings, the Court would issue an Order setting forth which grounds for relief could be argued at the hearing and which grounds for relief, if any, may be summarily disposed of by the Court.

The basis of Movant's RCr 11.42 motion is ineffective assistance of counsel. Movant's first contention is that counsel was ineffective by failing to move for a change of venue. The basic allegations of this case was that Michael Turpin, the husband of Movant, was killed by codefendants, Karen Brown and Keith Bouchard, as a result of a conspiracy between Movant and the co-defendants in order for Mo-

vant to collect on an insurance policy maintained by Michael Turpin on which Movant was the beneficiary. Complicity was alleged on the part of Movant. The Commonwealth sought the death penalty against the Movant and one of the co-defendants, Karen Brown. Co-defendant, Keith Bouchard plead guilty to the charge and agreed to testify for the prosecution against his co-defendants. This case appears to have been the first case in Fayette County in which the Commonwealth sought the death penalty for women.

It appears that the case was highly publicized in Fayette County. The record reflects that the Movant was indicted on March 25, 1986. The record further reflects that on March 26,1986, counsel for Movant filed a motion with the Court to place appropriate restrictions on all communication to the media during the pendency of the case. Movant was arraigned on March 28, 1986, and on the same day the Court entered an Order which prohibited the discussion of the case. The record reflects that the Court conducted voir dire of the potential jurors for five days. It appears that the Court took appropriate action to avoid pre-trial publicity and then extensively questioned potential jurors, therefore without specific allegations of juror misconduct based on publicity, this matter is hereby summarily dismissed and shall not be a basis for the relief requested.

Movant next alleges that trial counsel was ineffective by failing to interview and secure the attendance of material witnesses, especially in the penalty phase when Movant did not call any witnesses. This may have been trial strategy and it may have been effective since Movant did not receive the death penalty which the Commonwealth sought. If it was trial strategy it would not lead to ineffetiveness. If it was not strategy it would not be ineffective assistance of counsel without an allegation that the witnesses would have compelled acquittal. *Robbins* v. *Commonwealth*, Ky. App., 719 S.W. 2d 742, 743 (1986). This basis for relief is summarily dismissed and shall not be a basis for the relief requested.

The next basis stated for ineffectiveness of counsel is that Movant was not aware that she faced the death penalty and she was not properly prepared by counsel to testify. As previously stated, trial counsel for Movant filed a motion the day after her indictment for restrictions of communication. This motion stated that his client had been indicted for a capital offense. Movant was aware at the pre-trial conference that an offer would not be made in her case. The Court finds that this basis for relief is refuted by the record and is hereby summarily dismissed.

Movant's contention that counsel was ineffective because of the failure to file adequate pretrial motions is without merit. The record reflects that pre-trial motions were filed in Movant's behalf. This basis for relief his hereby summarily dismissed.

The next basis set forth for the ineffective assistance of counsel concerns trial counsel's failure "to object to inadmissible evidence which prejudiced the Movant in that the jury was allowed to hear evidence based on hearsay, speculation, inadmissible opinion, and other evidence, the prejudicial effect of which outweighed any probative value, including evidence of lifestyle and other irrelevant and highly prejudicial evidence."

Movant sets forth a litany of specific examples when objections were not made including failure to object to the co-defendant's testimony during the penalty phase; failure to object to the Movant's being placed into custody prior to the jury leaving the courtroom; and failure to object to the competency of her co-defendant, Keith Bouchard, to appear as a witness for the Commonwealth. The Commonwealth in its response states that much of the evidence, which Movant claims were not objected to, was admissible and relevant. This Court cannot now determine if this evidence was relevant and whether or not there was a basis to object to its admission. It is also impossible for this Court to determine if the lack of objections had to do with trial strategy. Trial counsel for the Movant may have determined that this evidence did not connect Movant to a

conspiracy to commit murder and that such evidence would be admitted to during the closing arguments but argue that this does not lead to proof that Movant committed the crime. There are numerous reasons, including ineffectiveness or prior rulings of the Court, that objections were not made.

As set forth in *Henderson* v. *Commonwealth*, Ky., 636 S. W. 2d 648, 650 (1982), the assistance of counsel right given under the Sixth Amendment requires that counsel be likely to render reasonably effective assistance. It is further stated that "counsel should be required to perform at least as well as a lawyer with ordinary training and skill in criminal law, utilizing that degree of training to conscientiously protect his client's interest." Criminal attorneys do not choose the same strategy, allegations of ineffective assistance of counsel are subject to the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984).

Movant does not contend that trial counsel did not understand criminal defense law. There is no contention that objections were not made throughout the trial by defense counsel, only that specific evidence and procedure were not objected to. A two prong test is set forth in *Centers* v. *Commonwealth*, Ky. App., 799 S.W.2d 51, 55 (1990). Movant "must meet a two-part test in order to prove ineffective assistance of counsel. He must show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different." The same standard applies to convictions by trial. Movant does not meet either of these tests. It is only speculative why counsel did not object and that the results would have been different if

objections were made. Therefore, the remaining basis set forth by the Movant are hereby summarily dismissed.

The Court having reviewed the filings regarding the RCr 11.42 motion and having reviewed the record, finds that the allegations set forth in the motion are not supported by the record or are mere conclusions with no factual support. The Court further finds that the Movant has not met her burden of proof to establish convincingly that a hearing is necessary to grant the extraordinary relief sought to right a deprivation of her substantial rights. Therefore, the hearing set for January 14, 1999 is removed from the docket and the Motion to Vacate is hereby OVERRULED.

Dated this 8th day January, 1999.

/s/ Gary D. Payne
Judge, Fayette Circuit Court

Attested copies of the foregoing Order have been mailed this 8th day of Jan., 1999, to:

Commonwealth Attorney
Hon. Franklin P. Jewell

By: /s/ [illegible], D.C.

RENDERED: MAY 19, 2000; 2:00 P.M.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 1999-CA-000117-MR

ELIZABETH TURPIN - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 86-CR-00172

OPINION—AFFIRMING

BEFORE: BARBER, DYCHE AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Elizabeth Turpin[1] (Turpin) brings this appeal from a January 8, 1999, order of the Fayette Circuit Court denying her RCr 11.42 motion to vacate her sentence. Having thoroughly reviewed this matter, we affirm.

Turpin was sentenced to life without the benefit of parole for twenty-five (25) years for the offense of murder by final judgment of the Fayette Circuit Court on December 2,1986, following her conviction after a jury trial. Turpin had been indicted along with Keith Bouchard (Bouchard) and Karen Brown (Brown) for the murder of Michael Turpin, her husband. The indictment alleged that Bouchard

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[1] Turpin has had her maiden name of Zehnder restored. However, all court documents refer to her as Turpin as will this appeal.

and Brown had stabbed the victim pursuant to an agreement and in conspiracy with Turpin for the purpose of receiving his life insurance proceeds. Bouchard entered a plea of guilty to murder prior to trial and testified against Turpin and Brown.

At trial, Turpin denied any involvement in the murder. However, testimony at trial by other witnesses, including Bouchard, provided sufficient evidence to prove Turpin's involvement in the murder scheme. She was found guilty and sentenced to life without parole for 25 years. Her conviction was upheld on direct appeal to the Kentucky Supreme Court in *Turpin* v. *Commonwealth*, Ky., 780 S.W.2d 619 (1989). After Turpin's federal habeas corpus was denied, she filed her RCr 11.42 motion to vacate judgment and sentence on September 30, 1997 (one day before the statute of limitations was to run).

Turpin's RCr 11.42 motion alleges that she was denied effective assistance of counsel generally and specifically that her attorneys (Turpin was represented by two attorneys throughout her case) failed to property investigate the case, failed to interview and call witnesses on her behalf, failed to properly object to inadmissible evidence and otherwise failed to protect her rights during the trial. In her memorandum of law filed in support of her motion, Turpin alleged 45 specific instances where she claimed her attorneys failed to object to inadmissable evidence. After each party filed two additional responses, the trial court, without an evidentiary hearing, entered its order denying the motion. This appeal followed.

On appeal, Turpin raises four arguments as to why we should reverse or at least grant an evidentiary hearing. We shall address each argument separately. First, Turpin claims that counsel failed to object to the procedure used by the trial court to bring her (and Brown) to and from the courtroom in view of the jury. Turpin contends that the procedure utilized of having matrons escort her to and from the courtroom emphasized that she was being detained in jail and this was an equal protection violation.

This issue does not appear to have been addressed by the trial court's order nor was a CR 52 motion filed. Be that as it may, it does appear that the issue was adequately raised by Turpin's attorney. At the beginning of the trial, a motion was made by Brown's attorney concerning how the two defendants were being brought to the courthouse and how they were escorted from the courtroom back to jail. Turpin's attorney joined in the motion and expressed his concern that the method used by the court had a prejudicial effect on his client. The trial court denied the motion. Trial counsel was not ineffective as to this issue. Counsel brought the alleged prejudicial treatment of Turpin to the trial court's attention by a proper motion. The fact that the trial court denied the motion does not make their attempt to remedy a perceived problem ineffective assistance of counsel.

The next issue raised by Turpin in her RCr 11.42 motion is that trial counsel failed to move for a change of venue. Although there was some pre-trial publicity, the newspaper articles Turpin filed in the record do not appear to be overwhelming or out of the ordinary for a murder investigation and indictment. In fact, the trial court issued a "gag order" at the arraignment of the case limiting the information made public. In addition, the trial court held extensive, individual voir dire to insure a fair and impartial jury. As the trial court stated "[it] took appropriate action to avoid pre-trial publicity and then extensively questioned potential jurors." Based upon that finding the trial court then ruled that "without specific allegations of prior misconduct based upon publicity, this matter is hereby summarily dismissed and shall not be a basis for the relief requested." Turpin has presented nothing to dispute this finding and we believe that had counsel moved for a change of venue the trial court would have properly denied such motion. Counsel was not ineffective as to this issue.

Turpin next complains of counsel's failure to call witnesses on her behalf, especially in the penalty phase of the

trial. Turpin claims that a former employer, friends from Virginia, and former teachers would have "presented an entirely different picture of appellant than the one painted by the Commonwealth." She has not presented any affidavits from these alleged witnesses, specifically named these witnesses, nor stated how they would have changed the outcome of the verdict or sentence. The trial court relied on *Robbins* v. *Commonwealth*, Ky. App., 719 S.W.2d 742 (1986), in finding that Turpin failed to show any prejudice by counsels' failure to present the alleged witnesses. Again, we agree with the trial court that Turpin has failed in her burden of proof as to her allegation of ineffective assistance of counsel on this claim of error.

Lastly, Turpin sets forth a list of 45 specific instances when counsel failed to object to testimony she believes would have been inadmissable. Turpin has meticulously read through the trial transcript and found answers to questions which she claims should have been objected to because they were based upon hearsay, speculation, inadmissible opinion, or were irrelevant or prejudicial. Though we agree that some of the 45 listed instances may have been objectionable, many, if not most, would not be considered inadmissible evidence. Also, when viewed in light of the overwhelming testimony against Turpin we do not believe she has met her burden in proving ineffective assistance of counsel.

As to this issue of numerous alleged evidentiary issues and objections, the trial court stated the following:

> The next basis set forth for the ineffective assistance of counsel concerns trial counsel's failure "to object to inadmissible evidence which prejudiced the Movant in that the jury was allowed to hear evidence based on hearsay, speculation, inadmissible opinion, and other evidence, the prejudicial effect of which outweighed any probative value, including evidence of lifestyle and other irrelevant and highly prejudicial evidence."
>
> Movant sets forth a litany of specific examples when objections were not made including failure to

object to the codefendant's testimony during the penalty phase; failure to object to the Movant's being placed into custody prior to the jury leaving the courtroom; and failure to object to the competency of her co-defendant, Keith Bouchard, to appear as a witness for the Commonwealth. The Commonwealth in its response states that much of the evidence, which Movant claims were (sic) not objected to, was admissible and relevant. This Court cannot now determine if this evidence was relevant and whether or not there was a basis to object to its admission. It is also impossible for this Court to determine if the lack of objections had to do with trial strategy. Trial counsel for the Movant may have determined that this evidence did not connect Movant to a conspiracy to commit murder and that such evidence would be admitted to during the closing arguments but argue that this does not lead to proof that Movant committed the crime. There are numerous reasons, including ineffectiveness or prior rulings of the Court, that objections were not made.

As set forth in *Henderson* v. *Commonwealth*, Ky., 636 S.W.2d 648, 650 (1982), the assistance of counsel right given under the Sixth Amendment requires that counsel be likely to render reasonably, effective, assistance. It is further stated that "counsel should be required to perform at least as well as a lawyer with ordinary training and skill in criminal law, utilizing that degree of training to conscientiously protect his client's interest." Criminal attorneys do not choose the same strategy, allegations of ineffective assistance of counsel are subject to the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984).

Movant does not contend that trial counsel did not understand criminal defense law. There is no contention that objections were not made throughout the trial by defense counsel, only that specific evidence

> and procedure were not objected to. A two prong test is set forth in *Centers* v. *Commonwealth*, Ky. App., 799 S.W.2d 51, 55 (1990). Movant "must meet a two-part test in order to prove ineffective assistance of counsel. He must show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different." The same standard applies to convictions by trial. Movant does not meet either of these tests. It is only speculative why counsel did not object and that the results would have been different if objections were made. Therefore, the remaining basis set forth by the Movant are hereby summarily dismissed.

In our review of the litany of stated objectionable evidence, we found most to be properly admitted testimony, some statements to actually be favorable to Turpin, most could be said to more accurately address the co-defendant Brown, some to be a misrepresentation of what actually transpired and most important, none to be so prejudicial as to warrant reversal. The test is whether, based upon a review of the evidence as a whole, there is any reasonable probability that the result of the case would have been any different absent the alleged offensive testimony. *Crane* v. *Commonwealth*, Ky., 726 S.W.2d 307, *cert. denied*, 484 U.S. 834, 108 S.Ct. 111, 98 L.Ed.2d 70 (1987). Our review of the evidence in this case dispels the existence of any such possibility. As stated earlier, the evidence of Turpin's guilt was overwhelming. The fact that there may have been several statements entered into evidence without counsel objecting to them does not warrant reversal. To prevail on a claim of ineffective assistance of counsel, the defendant must show first, that counsel made errors so serious that

counsel's performance did not meet that which is guaranteed by the Sixth Amendment and, secondly, that counsel's deficient performance prejudiced the defendant such that but for counsel's ineffective assistance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland* v. *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *Gall* v. *Commonwealth*, Ky., 702 S.W.2d 37 (1985), *cert. denied*, by 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986). There is a presumption that counsel's actions were a part of sound trial strategy and within the wide range of reasonable, professional assistance. *Strickland, supra; Robbins, supra.*

Turpin has failed to meet either prong of the *Strickland* two-prong test. Her motion, memorandum and briefs have not shown that counsel made serious errors nor that she was prejudiced or a different outcome would have resulted.

In that Turpin's RCr 11.42 allegations are refuted by the record, no evidentiary hearing was required. *Hopewell* v. *Commonwealth*, Ky. App., 687 S.W.2d 153 (1985).

For the foregoing reasons, the order of the Fayette Circuit Court denying appellant's RCr 11.42 motion to vacate her judgment and sentence is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:
Franklin P. Jewell
Louisville, Kentucky

BRIEF FOR APPELLEE:
A. B. Chandler, III
Attorney General of Kentucky

Todd D. Fergusōn
Assistant Attorney General
Frankfort, Kentucky

SUPREME COURT OF KENTUCKY

2000-SC-0491-D

(1999-CA-0117)

ELIZABETH TURPIN - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

FAYETTE CIRCUIT COURT
NO. 1986-CR-0172

OPINION AND ORDER

The motion for discretionary review is granted, the decision of the Court of Appeals is reversed, and the case is remanded to the Fayette Circuit Court for further consideration in light of *Fraser* v. *Commonwealth*, Ky., 59 S.W.3d 448 (2001), and *Norton* v. *Commonwealth*, Ky., ___ S.W.3d ___ (2001) (final January 27, 2002).

All concur.

ENTERED February 13, 2002.

/s/ [illegible]
Chief Justice